

Stephens College and Stephens Federation of Teachers, Local 3556 affiliated with American Federation of Teachers, AFL-CIO. Cases 17-CA-9600, 17-CA-9607, and 17-CA-9658

March 18, 1982

DECISION AND ORDER REMANDING

BY MEMBERS JENKINS, ZIMMERMAN, AND
HUNTER

Upon charges filed by Stephens Federation of Teachers, Local 3556 affiliated with American Federation of Teachers, AFL-CIO, herein called the Union, and duly served on Stephens College, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 17, issued a consolidated complaint on July 9, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charges and order consolidating cases, consolidated complaint, and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the consolidated complaint alleges in substance that on March 1, 1979, the Union was certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;¹ that, on or about April 11, 1980, Respondent withdrew its recognition of the Union and since such date Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the unit found appropriate; that, since on or about May 5, 1980, Respondent has failed and refused to furnish the Union with information requested by it which is relevant to, and necessary for, its performance of its function as the exclusive collective-bargaining representative of the employees in the unit found appropriate; and that, on or about April 16 and 18, 1980, Respondent bypassed the Union and dealt directly with the employees in the unit found appropriate regarding the allocation of salary increases. On July 15, 1981, Respondent filed its answer to the consolidated complaint ad-

mitting in part, and denying in part, the allegations in the consolidated complaint. Additionally, Respondent asserts in defense that the Union's certification is invalid because the collective-bargaining unit is inappropriate.

On October 23, 1981, Respondent filed directly with the Board a Motion for Summary Judgment. Subsequently, on November 10, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why Respondent's Motion for Summary Judgment should not be granted. Thereafter, the General Counsel filed a response to the Notice To Show Cause, the Union filed a response to the Notice To Show Cause and a Cross-Motion for Summary Judgment, and Respondent filed a response to the Union's Cross-Motion for Summary Judgment and to the Union's and the General Counsel's responses to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motions for Summary Judgment

Respondent's Motion for Summary Judgment is based upon its assertion that the Union's certification is invalid since the Board's underlying unit determination was based on a legal theory expressly rejected by the Supreme Court in *N.L.R.B. v. Yeshiva University*, 444 U.S. 672 (1980), and that, since its recognition of the Union was based on an invalid certification, its withdrawal of such recognition was lawful. Contrarily, the Union's Motion for Summary Judgment is based on its assertion that Respondent is barred by the doctrine of *res judicata* from relitigating issues regarding the Board's underlying unit determination notwithstanding the fact that such determination was based on a legal theory expressly rejected by the Supreme Court in *Yeshiva, supra*.

In support of its Motion for Summary Judgment, Respondent relies on the Board's denial of a motion it filed in the underlying representation proceeding requesting that the Board remand that matter to the Regional Director for Region 17 for additional evidence regarding the alleged managerial status of its full-time faculty; the motion to remand was based on the then recently issued decision of the Second Circuit in *N.L.R.B. v. Yeshiva University*, 582 F.2d 686 (2d Cir. 1978). In denying Respondent's motion to remand, the Board declined to follow the decision of the Second Circuit

¹ Official notice is taken of the record in the representation proceeding, Case 17-RC-8467, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enf'd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enf'd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enf'd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

in *Yeshiva, supra*, and stated that since it appeared² that the decisionmaking authority of the faculty existed on a collective and group basis, and that final authority for all decisions rested with Respondent's board of curators, the full-time faculty members were not supervisors within the meaning of Section 2(2) of the Act.³

Although it is true that the Supreme Court has rejected the Board's "collective authority" theory, the absence of specific record testimony regarding the ultimate decisionmaking authority of Respondent's full-time faculty makes it virtually impossible to analyze the instant matter in light of the standards set forth by the Supreme Court in *Yeshiva, supra*.⁴ It is well settled that, in order for a matter to be appropriate for summary judgment, it must

² Prior to filing its motion to remand Respondent had raised no questions regarding the status of its full-time faculty and, thus, there was little record testimony regarding their authority; what little testimony there was related to Respondent's argument that its department heads were not supervisors as defined in the Act since the president of the college assigned equal weight to the recommendations of the faculty and the department heads in exercising his decisionmaking authority.

³ *Stephens College*, 240 NLRB 166, fn. 2 (1979).

⁴ Indeed, Respondent concedes that in at least one significant respect the recommendations of the faculty are merely advisory. As Respondent stated in its brief in support of its request for review of the Regional Director's Decision and Direction of Election in the underlying representation proceeding:

affirmatively appear in the record (1) that there is no genuine issue as to any material fact and (2) that the moving party is entitled to a judgment as a matter of law.⁵ Having reviewed the instant matter in light of this standard, we conclude that there is a genuine issue as to the managerial status of Respondent's full-time faculty which cannot be resolved on the current record. Accordingly, we deny the Motions for Summary Judgment.

With respect to all important working conditions at the College, the recommendations of the various department heads and department faculty are simply advisory. The President of the College, with the consent of the Board of Curators, after an independent recommendation by the Dean of Faculty, personally makes every significant decision affecting wages, hours, and other conditions of employment of faculty members.

ORDER

It is hereby ordered that the above-entitled proceeding be, and it hereby is, remanded to the Regional Director for Region 17 for further appropriate action.

⁵ Fed. R. Civ. P. 56(c).